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JOHN W. DWYER, President  
jdwyer@lignite.com

1016 E. OWENS AVENUE  
P.O. BOX 2277  
BISMARCK, ND 58502  
TEL (701) 258-7117  
FAX (701) 258-2755

BY FAX: 303-312-6064

April 29, 2002

Richard R. Long  
Director, Air and Radiation Program  
EPA Region VIII  
Mail Code 8P-AR  
999 18<sup>th</sup> Street, #300  
Denver, CO 80202

Re: Comments on March 5<sup>th</sup> EPA Draft Dispersion Modeling Analysis

Dear Mr. Long:

On behalf of the Lignite Energy Council (LEC), we are submitting comments relating to the March 5<sup>th</sup> Draft EPA Dispersion Modeling Analysis. The Lignite Energy Council's membership includes major producers of lignite, who together produce approximately 30 million tons annually; investor-owned utilities and rural electric cooperatives from a multi-state area who generate electricity from lignite, serving two million people in the Upper Midwest region; and 240 Contractor/Supplier members providing goods and services to the lignite industry.

Please note that we are not representing, nor should our comments be construed to represent, those of our members who are commenting directly or otherwise participating in these Prevention of Significant Deterioration (PSD) issues before the EPA or the State of North Dakota.

At the outset, let me emphasize that the LEC shares Governor John Hoeven's goals of preserving the existing lignite generation facilities and the jobs they represent as well as the state's efforts to grow the lignite industry through the Lignite Vision 21 Program. Furthermore, we believe these goals can be achieved by continuing to improve North Dakota's air quality and by meeting PSD policies advanced by the State of North Dakota. We further believe EPA's March 5<sup>th</sup> approach is not supportable from both legal and technical perspectives and that EPA should defer to North Dakota's administrative process since North Dakota has an EPA-approved PSD program and will be conducting public hearings in early May and will be making its findings and decisions regarding the administration of the PSD program based on public input.

Additional factors EPA should consider in its review of its March 5<sup>th</sup> draft report are as follows:

- 1) North Dakota's air quality in its Class I areas has improved (not deteriorated) over the last two decades:

Specifically, in 1982, 1984 and most recently in 1993, the Department of the Interior (through the National Park Service) determined that North Dakota sources have no adverse effects on air quality related values in North Dakota's Class I areas in Theodore Roosevelt National Park (TRNP). Interior's findings concluded there was no significant impact on visibility, no injury to sensitive species, no impairment of ecosystems, no impairment of the quality of visitors' experience, no diminishment of the national significance of the areas, and minimal impact on two sensitive species of lichen. Interior's 1993 certification included a finding that air quality in the areas had actually improved since 1984. Furthermore, ambient monitoring of sulfur oxides in TRNP North and South Units show significant improvement in the North Unit between 1993 and 2000 and stable, near nondetectable levels in the South unit (Exhibits 1, 2, 3 & 4). Additionally, utility boiler emissions in North Dakota have been reduced from 1993 to 2000 (Exhibit 5).

- 2) EPA should fully recognize sources that receive variances so they do not consume Class I increment:

The Clean Air Act allows the permitting of sources that exceed the Class I increment if they obtain certification from the Federal Land Manager (National Park Service [NPS] in this case) that there is no adverse effect on air quality related values in the Class I areas. Since 1982, all major sources and major modifications permitted in North Dakota have obtained from the NPS such certifications, which are referred to as "variances". Until EPA Region VIII's recent letters to North Dakota, EPA has never contended that the Class I increments must be met when a variance has been granted. EPA's recent position on variances reverses more than two decades of practice and interpretation and is directly contrary to the Clean Air Act, which exempts such variance sources from compliance with the Class I increments. As the Court in the Alabama Power case noted, such waivers of the Class I increment have "vitality and recognition in that facilities granted special consideration under these provisions are, in effect, treated as facilities operating in compliance with the provisions of the Act." (*Alabama Power Co. v. Costle*, 636 F.2d at 323,363 [D.C. Cir. 1979])

- 3) EPA should defer to North Dakota and recognize state primacy, since North Dakota has an EPA-approved PSD program:

EPA's March 5<sup>th</sup> Draft and resulting threatened SIP call poses a fundamental challenge to North Dakota's authority to make vital decisions on economic growth and environmental protection. The Clean Air Act states that "air pollution prevention...and air pollution control at its source, are the primary responsibility of States and local governments."<sup>1</sup> The determination of how much deterioration is "significant" in areas that are already substantially cleaner than required by health and welfare standards is ultimately a subjective and arbitrary determination that is essentially one of land use, best made by those who are affected by it.<sup>2</sup> Congress, EPA and the courts have recognized that important discretionary Prevention of Significant

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<sup>1</sup>42 U.S.C. 7401

<sup>2</sup> 38 Fed. Reg. 18986, 18988 (July 16, 1973) & 39 Fed. Reg. 31001 (Aug. 27, 1974)

Deterioration (PSD) determinations are the primary responsibility of state and local government. As the U.S. Circuit Court of Appeals for the District of Columbia noted in the leading case on the PSD program, subject only to the minimum requirements of the federal program:

*"...growth-management decisions [such as management of increment consumption] were left by Congress for resolution by the states." (Alabama Power Co. v. Costle, 636 F.2d 323,374 [D.C. Cir. 1979])*

A state's exercise of its discretion on the matter of increment consumption is, at most, subject to EPA intervention only if the state has made a "clearly erroneous" legal determination, or if it is arbitrary and capricious.

- 4) EPA's March 5<sup>th</sup> Draft is deficient in not incorporating recent State of North Dakota/Department of Health (DOH) baseline data:

The EPA March 5<sup>th</sup> draft does not include the most recent industry baseline data nor the DOH recommendations regarding the industry data. Industry responses to the DOH's baseline data requests of July of 2001 should be included. Similarly, the March 5<sup>th</sup> EPA draft does not include the recent DOH baseline oil and gas well emissions inventory that has been developed. Because the emissions from the oil and gas industry have decreased since the baseline period, DOH interpretations suggest a net increment expansion, which is contrary to EPA's March 5<sup>th</sup> draft, which does not include these emissions either as increment expanding or as increment consuming.

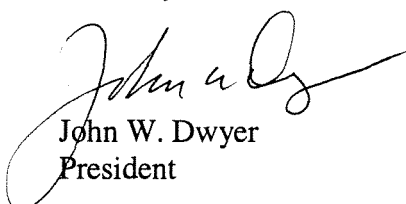
- 5) EPA's March 5<sup>th</sup> Draft inappropriately applies an unapproved air quality model to the Fort Peck and Medicine Lake Wilderness Area in Montana:

EPA's March 5<sup>th</sup> draft utilizes the Calpuff model which has not yet been validated or approved for PSD purposes. Additionally, the "unapproved" Calpuff model is being applied to distances (Fort Peck and Medicine Lake) greater than 200 km from sources in North Dakota, even though EPA's guidance for the Calpuff model suggests its application beyond 200 km is flawed. Additionally, EPA is now retroactively applying its PSD increments to a re-designated area to Class I (Fort Peck in 1984) which, we believe, cannot be supported legally.

#### Summary

In summary, we appreciate the opportunity to comment on EPA's March 5<sup>th</sup> draft. We vigorously contend that EPA's March 5<sup>th</sup> draft is technically questionable and legally deficient. Furthermore, in carrying out its responsibilities under the federal-state program, EPA should defer to Congressional and judicial interpretations that give the State of North Dakota primacy in its administration of its approved PSD program.

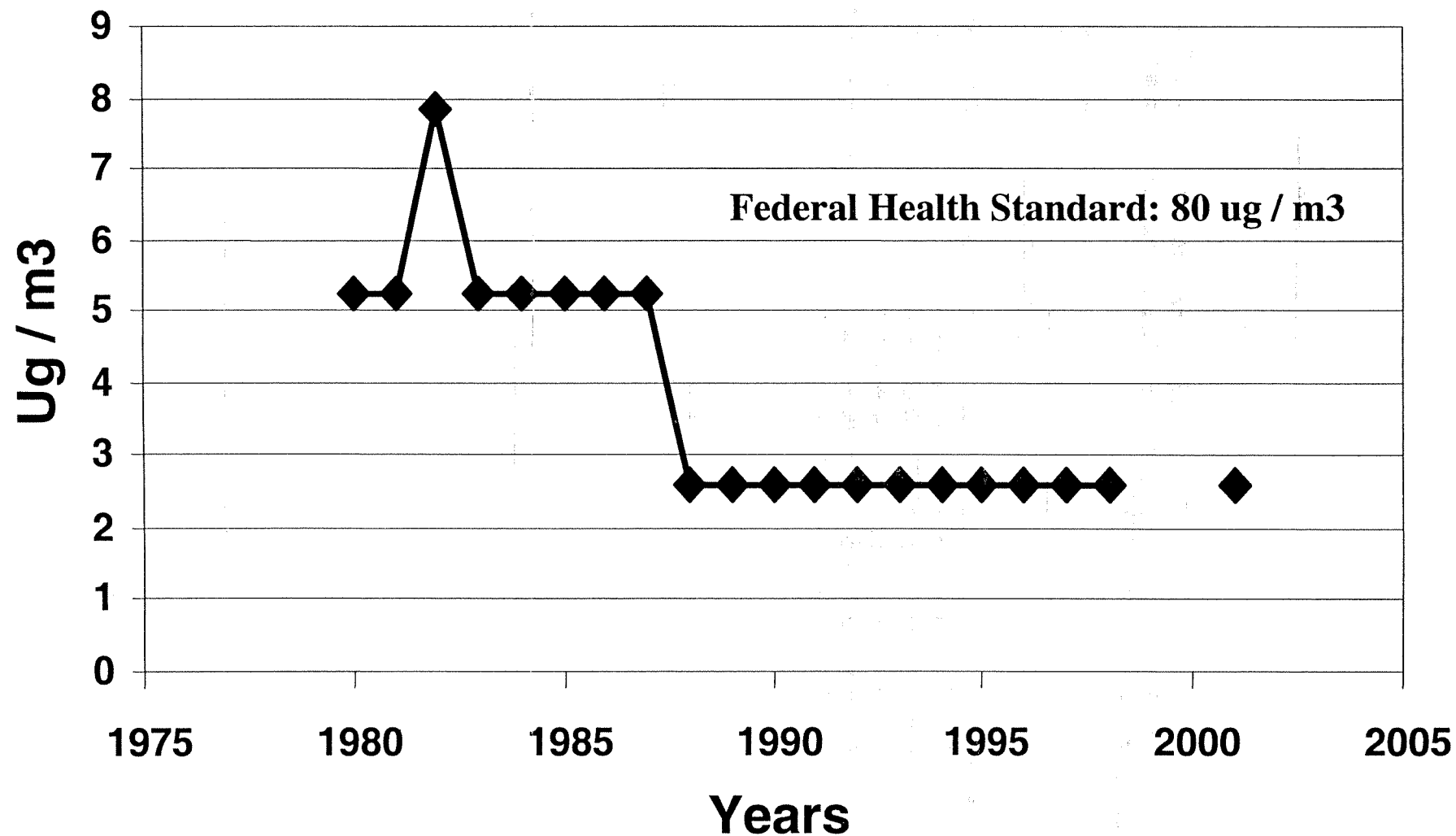
Sincerely,



John W. Dwyer  
President

cc: Board of Directors, Lignite Energy Council

# Theodore Roosevelt National Park North Unit Annual Sulfur Dioxide Concentration

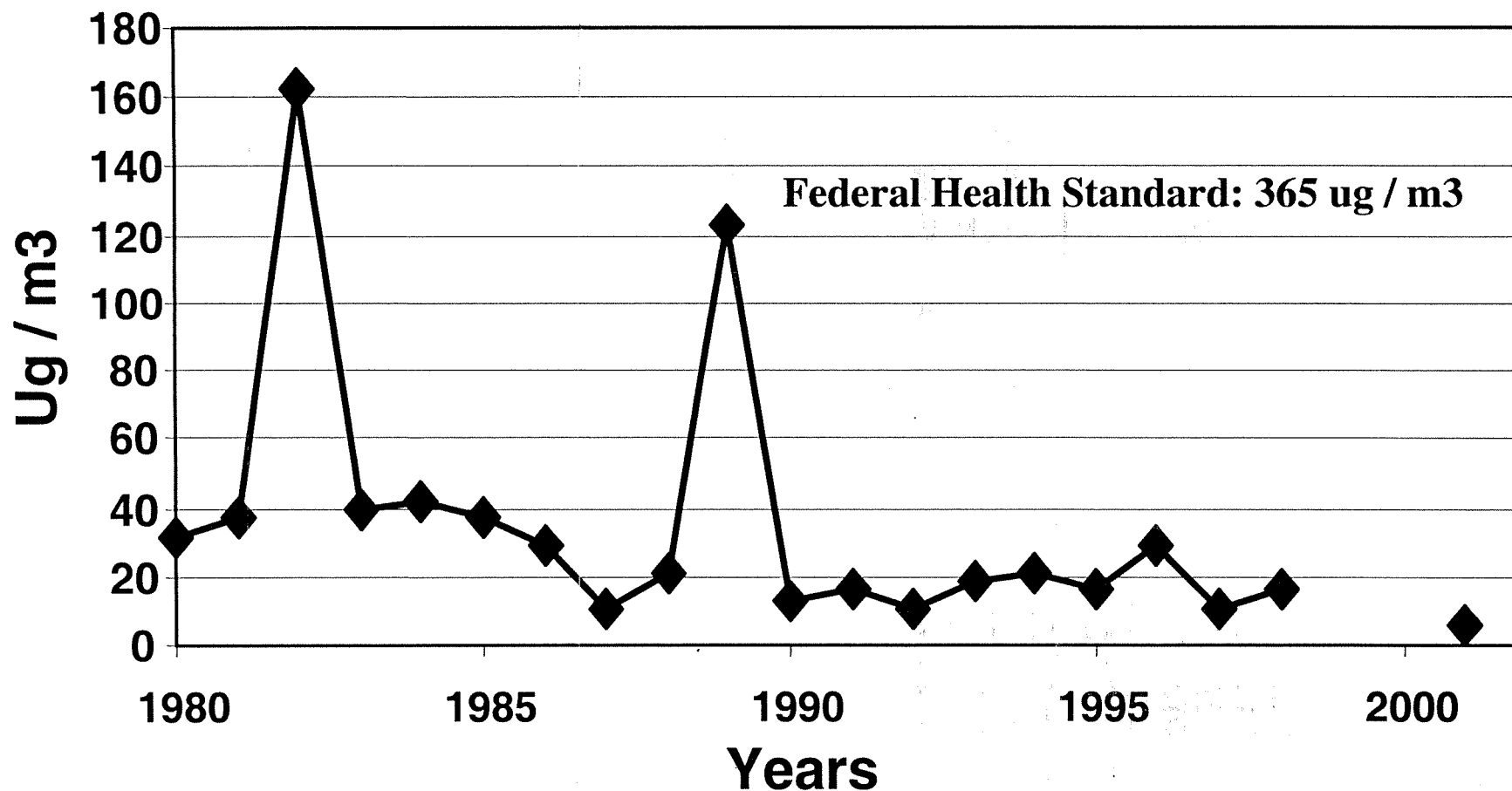


Source - ND Department of Health  
DOH data not collected for years 1999-2000

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# Theodore Roosevelt National Park North Unit

## 24 - Hour Sulfur Dioxide Concentration

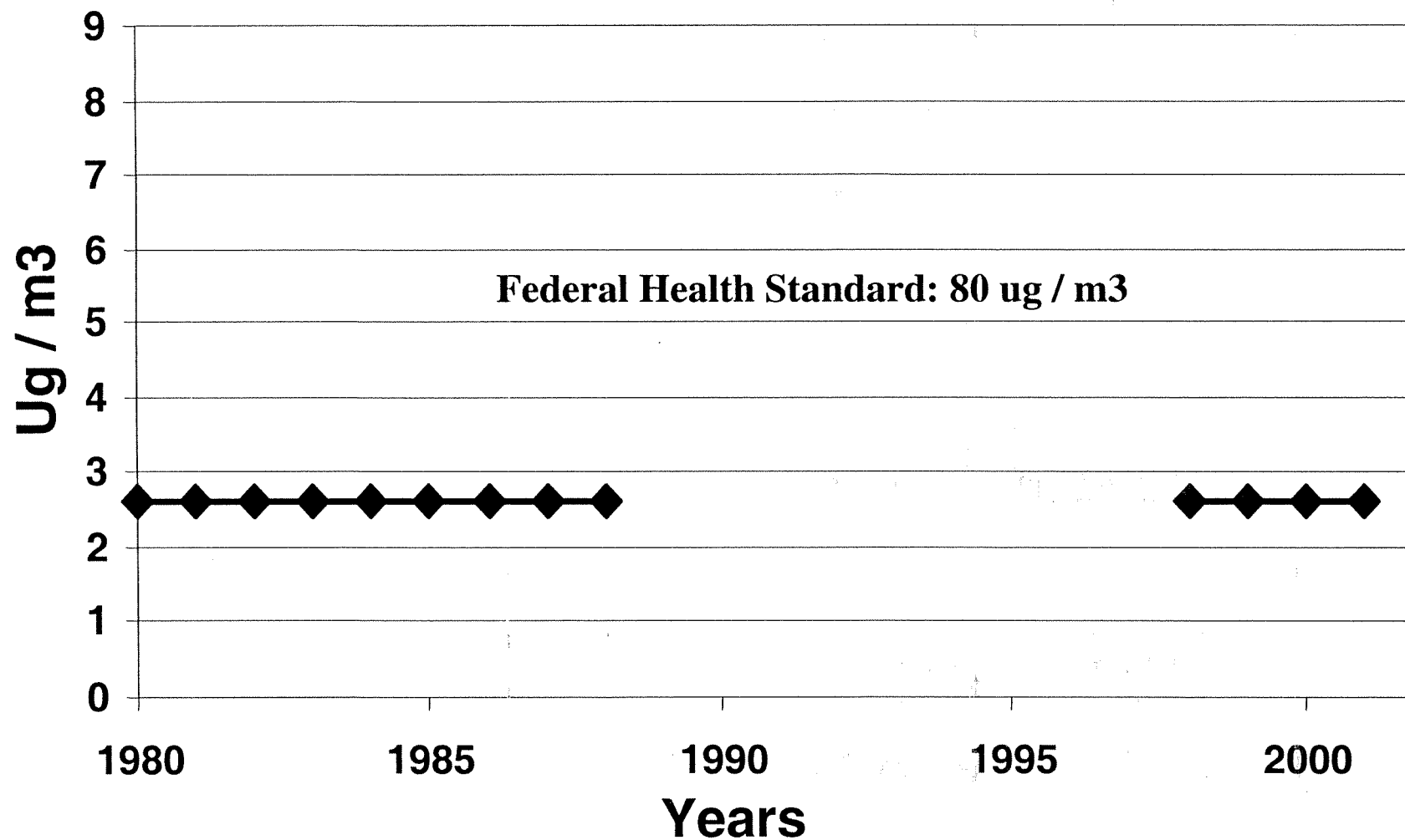


Source - ND Department of Health  
DOH data not collected for years 1999-2000

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# Theodore Roosevelt National Park South Unit

## Annual Sulfur Dioxide

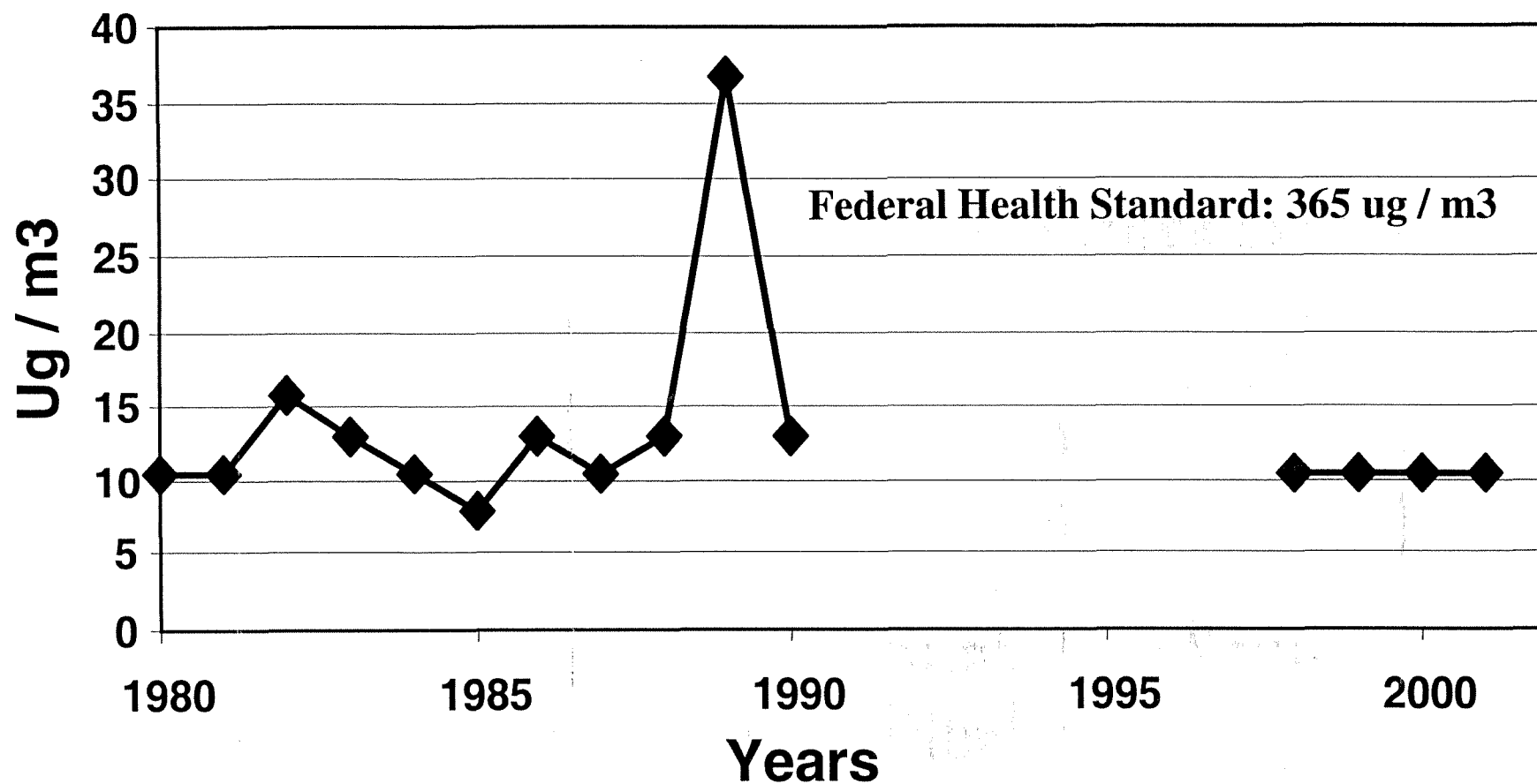


Source - ND Department of Health  
DOH data not collected for years 1989-1997

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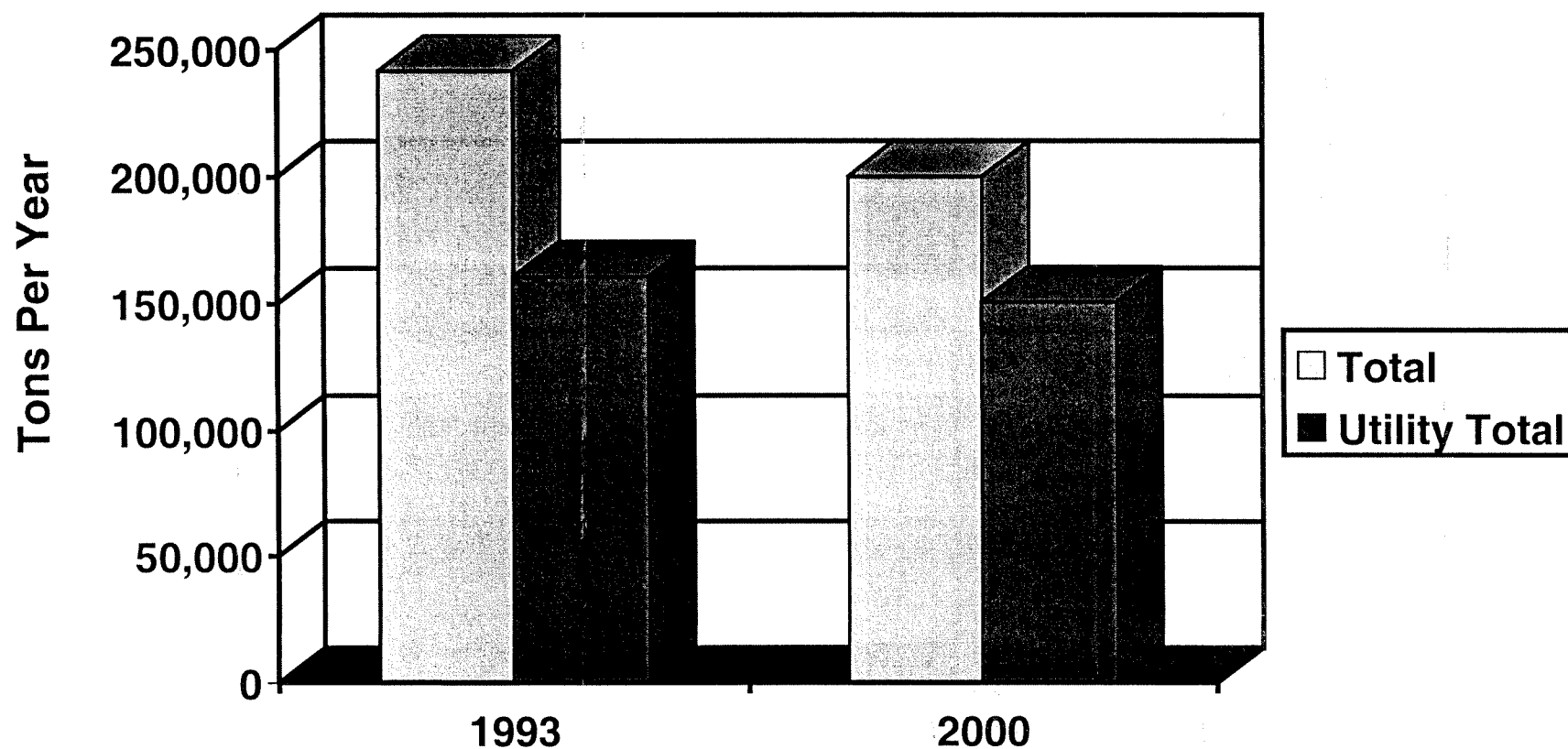
# Theodore Roosevelt National Park South Unit

## 24 - Hour Sulfur Dioxide Concentration



Source - ND Department of Health  
DOH data not collected for years 1991-1997

# Trends in SO<sub>2</sub> Emissions in North Dakota



*Source: ND Department of Health*

4/29/02